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In the Supreme Court of the United States

October Term, 1949

No. 172

HARRY W. SCHUERMANN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 79 F. Supp. 247. The opinion of the Court of Appeals is set forth in the appendix to petitioner's brief and is reported in 174 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1949. (R. 976.) The petition for rehearing was denied on June 8, 1949. (R. 1003.) The petition for a writ of certiorari was filed July 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. See also Rules

37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether, in the circumstances here present, the trial court erred in failing to instruct the jury, *in haec verba,* that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt against him.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

> RULE 30. INSTRUCTIONS. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

The petitioner was charged in a four-count indictment returned in the Eastern District of Missouri with having wilfully attempted to evade and defeat his income taxes for the calendar years 1942, 1943, 1944, and 1945, by filing false and fraudulent tax returns for each of those years, in violation of Section 145(b) of the Internal Revenue Code. (R. 5-9.) The indictment alleged that the petitioner had understated his income in the total amount of $206,344.39 and his tax liability in the

total amount of $140,824.19 for the four-year period.[1]

After trial by jury, the petitioner was convicted and was sentenced to nine years' imprisonment, five years of which were suspended, and was fined a total of $40,000. (R. 933-934.)

During the period in question, petitioner illegally operated a form of lottery known as the "policy" or "numbers" game. (R. 82, 84, 89, 110, 117, 710.) His returns were prepared by a lawyer-accountant from memoranda furnished by the petitioner, which showed the purported ultimate results of his operations. (R. 113-118.) When interviewed by the investigating agents, petitioner stated that he had

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[1] The alleged understatement of tax and income by years is as follows:

NET INCOME

Year	*Per Return*	*Per Indictment*	*Difference*
1942	$15,513.94	$ 20,589.05	$ 5,075.11
1943	(Loss of $1,354.94)	32,945.47	32,945.47
1944	3,682.24	109,064.60	105,382.36
1945	17,295.06	80,236.51	62,941.45
Total	$36,491.24	$242,835.63	$206,344.39

TAX

Year	*Per Return*	*Per Indictment*	*Difference*
1942	$ 4,280.41	$ 6,816.88	$ 2,536.47
1943	None	15,080.00	15,080.00
1944	645.55	77,754.43	77,108.88
1945	5,851.38	51,950.22	46,098.84
Total	$10,777.34	$151,601.53	$140,824.19

no books and records, and he produced none for examination by the agents. (R. 577.) In a prior investigation of petitioner's tax liability for the years 1938, 1939, and 1940, petitioner was informed that he was required to maintain adequate accounting records of his operations. (R. 106, 138.)

The evidence showed that in each of the years 1942, 1943, 1944, and 1945 the petitioner expended and invested sums far in excess of his reported income (R. 64-592)—the excess for the four-year period amounting to approximately $208,000 (R. 588). As tending to preclude the possibility that such expenditures and investments were made out of prior accumulations of capital, it was shown that petitioner filed no income tax-returns for the years prior to 1936. (R. 99-100.) The investigating revenue agent testified that he had made an analysis of net taxable income reported by petitioner for the years 1936 through 1941 and had found that the reported income was barely sufficient to cover petitioner's personal expenses and a $15,450 loss sustained by petitioner on an investment made during that period. (R. 610-611.) He further testified that his investigation had disclosed no gifts, inheritances, or loans to petitioner (with the exception of one loan of $1,500) (R. 637-642); and that petitioner, in an interview with the agent on August 9, 1945 (R. 575), had stated, among other things, that "he had no large sums of currency on hand at any time" (R. 577-578). There was also evidence that for a portion of the year 1944 petitioner had

periodically furnished large sums, consisting chiefly of currency, to a third-party nominee who deposited the money in a "special" bank account and then drew checks on the account payable to the officer of a corporation which petitioner controlled.[2] (R. 261-276, 328-347.)

Petitioner's tax return for 1936 reported a net income of $3,660.80 (R. 67); for 1938 of $3,665 (R. 68); for 1939 of $4,831.30 (R. 70); for 1940 of $8,590 (R. 72) and for 1941 of $14,914.57 (R. 75) —a total of $35,661.67. The tax return for 1937 had been destroyed (R. 99) and, upon the objection of petitioner, the court refused to admit evidence of the amount of the tax assessment for that year (R. 596-598) from which 1937 income could have been determined. However, one of petitioner's witnesses, an accountant, stated that he had determined from the retained copy of petitioner's 1937 return that the cash available to petitioner from his reported 1937 income, after payment of taxes but before allowance for living expenses, was $2,984. (R. 742, 746.) As a result of the prior investigation of petitioner's tax liability for the years 1938, 1939, and 1940, the Bureau of Internal

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[2] The amounts and dates of the various deposits were as follows: February 10, 1944, $5,000 currency; March 15, 1944, $3,000 currency; March 22, 1944, $8,000 currency; March 23, 1944, $2,000 mostly in checks; April 10, 1944, $5,000 in checks; May 19, 1944, $700 in currency; June 27, 1944, $800 in checks; July 6, 1944, $40 in currency; July 22, 1944, $100 in currency; August 26, 1944, $100 in currency; September 28, 1944, $3,500 in checks; and October 28, 1944, $300 in checks. (R. 263,275.)

Revenue determined that there was a total unreported net taxable income for those three years of $17,888.50. (R. 105, 139-141.) The total of the reported and unreported income for the years 1936 through 1941 is therefore approximately $56,500.

In addition to the fact that petitioner failed to keep records of his operations and that he furnished currency to a nominee for deposit by the latter in a "special" account, there was other proof of concealment of income. Petitioner rented a safe-deposit box in a fictitious name (R. 398), and visited the box frequently (R. 294). Currency withdrawn from the safe-deposit box was used to purchase real property, title to which was taken in the name of a third person. (R. 479-481.) Securities were also bought in the names of nominees and were subsequently endorsed to petitioner. (R. 227-229, 327-329, 410-412, 486-487.) And practically all of petitioner's investments and expenditures were made with currency. (R. 215, 218, 224, 228, 231-232, 410-412, 480.) In the interview with the revenue agent on August 9, 1945, petitioner denied that he had assets in any name other than his own (R. 576); denied that he had a safe-deposit box (R. 577); and falsely stated that he had given a mortgage to the nominee in whose name real property had been purchased for a portion of the purchase price of such property (R. 479-481, 576).

Petitioner himself did not testify at the trial, but testimony offered in his behalf, with respect to the amount of his assets prior to 1942, was to the

effect that in 1922, when petitioner was eighteen years old (R. 709-710), his maternal grandmother had loaned him $25,000 for the purpose of financing and enlarging the scope of his hand-book operations, in which he was then engaged "on the side" (R. 694-695, 706-711). The grandmother died in 1931, and the loan has not been repaid. (R. 711-712.) Petitioner's father also testified that, in 1934, he helped petitioner count $100,000 which petitioner kept "in a black metal box" in his bedroom. (R. 695-696, 723.) Two accountants called by petitioner stated that, according to their analysis of petitioner's income tax-returns for the years 1936 through 1941 and of his living expenses and investments during that period, petitioner had available in cash, at the end of 1941, after deducting living expenses and income taxes paid, approximately $57,000, and, if his wife's income during that period was taken into account, approximately $59,000. (R. 744, 766, 817.) One of the accountants also testified that "over a period of years" the petitioner had received $11,280.33 in non-taxable service disability income.[3] (R. 751.)

The case was argued to the jury during the morning of July 1, 1948, and the arguments were concluded at 12:55 p.m. (R. 39.) At that time, petitioner's counsel presented to the court twenty-two requested instructions. (R. 868-884.) The rec-

[3] The revenue agent testified that the amount of this disability income was about $50 per month and that he had disregarded these payments in his computations. (R. 659-660.)

ord does not show that copies of the requests were furnished to Government counsel. (R. 869.) The court excused the jury until 2:30 p.m. for the noon recess, and a colloquy then ensued between the trial court and counsel for the petitioner. (R. 868-869.) The court reminded counsel that it had asked for requests at noon on the day before; that the requests had not been submitted within the time prescribed by the Rules of Criminal Procedure; and that because of the belated submission the court could not give the requested instructions the attention they should have. (R. 868-869.)

At 2:30 p.m., when the trial was resumed, the court said to counsel (R. 869):

> I have gone over the twenty-two instructions submitted to me just before the noon recess by defendant. I think most of them are included in my charge, if not in the language they are requested, the substance of them.

Among the twenty-two instructions requested by petitioner was the following (R. 871-872):

> The Court instructs the jury that the fact that the defendant has not testified in his own behalf does not create any presumption of guilt against him. The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is

charged and that he cannot be convicted unless the government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you. And the Court further instructs the jury that it must not permit the fact that defendant has not testified in his own behalf to weigh in the slightest degree against the defendant, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner.

The charge of the court relative to this same subject was as follows (R. 892, 898):

The defendant is presumed to be innocent, and this presumption abides with the defendant at all stages in this trial, and this assumption continues until the evidence proves the defendant guilty beyond a reasonable doubt.

And the burden of convincing you of the guilt of the defendant rests on the government solely and not on the defendant in any respect whatsoever.

* * *

The burden of proof rests upon the government throughout the case and never shifts, to sustain the charge as set forth in each count; and under the law governing this case, the presence of such testimony in the record of the character I have referred to puts no burden on the defendant to explain where or how he obtained the money so used by him.

At the conclusion of the court's charge, counsel for petitioner took the following exception, among others (R. 906):

> The defendant further objects to the charge of the Court because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt.

ARGUMENT

I

The petitioner contends that the decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *J. Baker Bryan, Sr.* v. *United States,* No. 178, October Term, 1949, and with the decision of the Court of Appeals for the Seventh Circuit in the case of *United States* v. *Chapman,* 168 F. 2d 997, certiorari denied, 335 U.S. 853. This contention is predicated upon the claim that the evidence showed only that petitioner's investments and expenditures during the period covered by the indictment were in excess of his reported income for the same period and that there was no evidence at all from which the jury could properly have inferred that such expenditures and investments were made out of current income. (Br. 25, 27.) It is submitted that petitioner's contention is not supported by the record.

The petitioner did not file any income tax returns for any years prior to 1936. (R. 99-100.)

According to petitioner's evidence, which the jury chose not to believe, he had accumulated prior to 1936 the sum of at least $100,000 (R. 694-697; Br. 19, 27) from his hand-book operations which "he established one after another" (R. 695) after he had obtained a loan of $25,000 from his grandmother in about 1922 (R. 694, 709-710). The fact that the petitioner filed no income tax returns for years prior to 1936 belied his contention upon trial that he had earned substantial sums during those years. This fact alone therefore constituted substantial evidence from which the jury could have inferred that petitioner's investments and expenditures during the indictment years came from current income and not from accumulations earned prior to 1936, as he contended.

But there was other evidence, also of a substantial and convincing nature, that petitioner was understating his income during the indictment years. During the course of the investigation which led to the indictment, petitioner stated to the revenue agent that "he had no large sums of currency on hand at any time." (R. 577-578.) Petitioner periodically furnished cash to a nominee who deposited the money in a "special" bank account and then drew checks on the account payable to the officer of a corporation which petitioner controlled—an action entirely inconsistent with the claim that petitioner's investment in this corporation came from prior accumulations of capital. There is, in addition, the wealth of evidence outlined in the

foregoing Statement which shows the elaborate lengths to which petitioner went to conceal his receipt of current income—the renting of a safe-deposit box in a fictitious name, the frequent visits to that box, the purchase of property in a fictitious name with currency withdrawn from the box, the conduct of practically all business transactions with currency and in the names of nominees, the failure to keep records, the attempt to make it appear that he was borrowing money for the purchase of his home from his father, and the false statement to the revenue agent that he had no assets in names other than his own.

Petitioner would attempt to escape the effect of some of this evidence by contending (Br. 28, fn. 3) that it bears only on the question of wilfulness, which, he says, is an element of the offense distinct from proof of receipt of current income. This is a convenient classification, but it will not serve to deprive the evidence of its full significance. The elaborately and deviously woven financial screens behind which petitioner operated do, when penetrated, show wilfulness—and show it in the extreme—but they do not necessarily show only wilfulness. By their very nature they also show that petitioner was attempting to conceal receipt of current income and that he had income in excess of that which he reported during the indictment years.

The Court of Appeals correctly held that the Government was not required to make a perfect case or to prove the petitioner guilty to a mathe-

matical certainty. Petitioner's refusal to accept this well-established principle is the primary reason why he still challenges the sufficiency of the Government's evidence in this case. But, at this stage of the proceedings, the sufficiency of the evidence to sustain the conviction is not to be tested in the light of the Government's evidence alone. Since petitioner elected to put on his own case, after his motion for judgment of acquittal at the close of the Government's case had been overruled, this Court in appraising the sufficiency of the evidence will consider the Government's evidence, not *in vacuo,* but in relation to the evidence adduced by the petitioner. *United States* v. *Goldstein,* 168 F. 2d 666 (C.A. 2d).

Thus considered, there can be no doubt that the record furnishes ample warrant for petitioner's conviction. Petitioner's defense in this case was that the funds which he used to make his large expenditures during the indictment years came, not from any prior gifts or inheritances, but from prior earnings and a $25,000 loan from his grandmother.[4] (Br. 19, 28.) Certainly, in view of the Government's evidence to the effect that the petitioner filed no *income* tax returns prior to 1936 and that the amount of his reported *income* from 1936

[4] Even if this loan is recognized, it would not affect the net worth computation, since the effect of its recognition as a liability is to decrease the net worth both at the beginning of 1942 and the end of 1945, and hence the increases in net worth during the period would remain the same as shown by the proof.

to 1941, inclusive, was barely sufficient to cover his living expenses and a loss which he sustained on an investment, it cannot now be reasonably contended that there was no evidence before the jury to justify an inference that the petitioner did not earn, and consequently did not save, the amounts he claimed he did. Assuming, *arguendo*,[5] that "The *evidence of the government* [did] not exclude the *possibility* that the defendant had some substantial accumulation of capital on December 31, 1941, or that sometime, somehow and somewhere he acquired a large amount of capital out of which he made the loans, investments and expenditures which the government contends reflect income" [emphasis added], as the Court of Appeals states in its opinion (174 F. 2d 397, 399), petitioner is hardly in a position to raise that question now when his own evidence effectively negates the possibility that he acquired by gift or inheritance any appreciable part of the sums which he expended.

The foregoing discussion makes it clear, we believe, that the decisions in *United States* v. *Chapman*, 168 F. 2d 997, certiorari denied, 335 U.S. 853, and in *J. Baker Bryan, Sr.* v. *United States*, decided May 13, 1949 (C.A. 5), are not in conflict with

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[5] Actually, the Government did introduce evidence to the effect that there were no gifts or inheritances prior to 1942. The investigating revenue agent testified that "after a very careful, careful examination" (R. 641), he had not found any gifts or inheritances (R. 609-611, 637-642).

the decision of the Court of Appeals in this case. The principal contention in the *Chapman* case, with respect to the sufficiency of the evidence, was that proof of the starting point for the net-worth computation was based on extra-judicial admissions of the taxpayer which were not corroborated by other evidence. The Court of Appeals for the Seventh Circuit pointed out that, under the rule announced by this Court in *Warszower* v. *United States,* 312 U.S. 342, an extra-judicial admission made prior to the commission of the offense charged in the indictment need not be corroborated by other evidence. Here, the record of petitioner's reported income for the years 1936 through 1941 and the record of his failures to file tax returns for years prior to 1936 constitute proof of admissions made prior to the commission of the offenses charged in the indictment, and hence under the *Warszower* rule did not need to be corroborated.[6] In the *Bryan* case, the Court of Appeals for the Fifth Circuit appraised the evidence and found there was *no* evidence from which the jury could have inferred that

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[6] It is also interesting to note in connection with the *Chapman* case that in order for the Government to prove Chapman's net worth as of January 1, 1943 (the only indictment year), it was necessary to rely, in part, upon Chapman's 1942 return. Chapman, in his petition for certiorari in this Court (No. 252, October Term, 1948), claimed that, since there was a possibility that he had understated his 1942 income on his return, the Government's proof did not establish his net worth as of January 1, 1943, with that degree of certainty required in a criminal case.

the defendant's expenditures were made out of current income. In the present case, the Court of Appeals for the Eighth Circuit appraised the evidence and found that it might "reasonably . . . be inferred, from the defendant's returns for the years prior to 1942, that the likelihood of his having accumulated a large surplus from his activities was negligible." (174 F. 2d, 397, 399.) Moreover, the Court of Appeals for the Fifth Circuit noted "the absence," in the *Bryan* case (*Bryan* R. 356), "of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the Defendant as to the lack of additional assets at the beginning of the tax period." Such evidence was present in this case, and the Court of Appeals for the Eighth Circuit noted its presence.

Finally, we believe that the evidence in this case measures up in all respects to the standards prescribed by this Court in *United States* v. *Johnson,* 319 U.S. 503, and, as stated by the Court in that case (p. 517), it is "not a matter of tenuous speculation but of solid proof that there [was income] of a substantial amount which [Schuermann] did not report."

II

After argument to the jury, instead of "at the close of the evidence or at such earlier time during the trial as the court reasonably directs," as is required by Rule 30 of the Rules of Criminal Procedure, *supra,* petitioner handed up to the trial

court twenty-two written requests for instructions. Copies of the requests were not furnished to Government counsel, as the rule provides. Among the twenty-two requests was one patterned after the request which this Court held in *Bruno* v. *United States*, 308 U.S. 287, 293, that a trial court was obliged to give, "when appropriately invoked."

Petitioner now contends (Br. 32) that his failure to comply with the terms of Rule 30 was a mere technical failure and that he had an "indefeasible" right to have the jury told, *in haec verba*, that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt against him.

We submit that, in the circumstances here present, petitioner's belated submission of his request amounted to more than a mere technical violation of a procedural rule, and, moreover, that since the trial court gave the substance of the requested instruction in its charge and petitioner did not advise the trial court or Government counsel that he had elected to have the precise language of the *Bruno* instruction included in the charge, petitioner will not now be heard to claim that the charge was erroneous.

One of the purposes of the requirement in Rule 30 that requests be submitted prior to argument and that copies be furnished to opposing counsel is to enable the trial court to obtain the views of counsel as to the propriety of the instructions requested and to have sufficient time to consider the

requests before the charge to the jury is formulated. That petitioner's actions defeated this purpose is manifest. The colloquy that ensued between the trial court and petitioner's counsel immediately after the requests were submitted shows plainly and unmistakably that because the requests were tardily submitted the court was deprived of an opportunity to give them full consideration. The court reminded petitioner's counsel (R. 868-869):

> * * * the Court *has to have some time to examine instructions.* If it was not for taking a noon recess, I would instruct the jury now. I asked you for your requests yesterday at noon. * * * You read the rules. They require they [the requests] be given the Court a sufficient length of time before the arguments start *so the Court can go over them,* and now you waited until the arguments are in. * * * I am just saying what the record shows you have done, *and why I can not give these instructions the attention they should have.* [Emphasis added.]

About one hour and a half later, when the trial was resumed, the trial court said to counsel (R. 869):

> I have gone over the twenty-two instructions submitted to me just before the noon recess by defendant. I think most of them are included in my charge, *if not in the language they are requested, the substance of them.* [Emphasis added.]

The petitioner was thus given fair warning that, despite the limited time available, the trial court had reviewed the instructions and was of the belief that his charge as then formulated contained the substance of most of the instructions requested. And, indeed, the charge did include the substance of the request now in question. The charge carefully explained that the petitioner was entitled to a presumption of innocence which abided with him at all stages of the proceedings; that the burden of proof was on the Government and never shifted to the petitioner; and, more specifically, that there was (R. 898) "no burden on the defendant to explain where or how he obtained the money so used by him." The import of the charge was therefore the same as the import of the request. Moreover, the language of the charge was strikingly similar to the language of the second sentence of petitioner's request, which read (R. 871-872):

> The Court further instructs the jury that, under the law, the defendant does not have to prove himself innocent of the offenses of which he is charged in the indictment and that, in our courts of justice, the defendant has the right to stand on the presumption of innocence of the offenses of which he is charged and that he cannot be convicted unless the government has proven the offenses charged against him beyond all reasonable doubt, as the Court has defined that term to you.

At the conclusion of the charge, the petitioner took several exceptions (R. 906-907), one of which

was "The defendant further objects to the charge of the Court because it did not include an instruction that the fact that the defendant had not testified in his own behalf did not create any presumption of guilt." Petitioner contends that this exception plus his belated request adequately apprised the trial court and Government counsel that he had elected to have the trial court comment in the precise language of the request on his failure to testify. We do not believe that petitioner's actions can or should be so construed. Petitioner knew, or should have known, from the court's comments and from the charge itself that the court believed it had given the substance of the requested instruction. At no time did petitioner apprise the trial court or Government counsel (who did not even have copies of the requests) that the ground of his objection to the charge was that it did not include the precise language of his request. Rule 30 provides:

> No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, *stating distinctly* the matter to which he objects and *the grounds* of his objection. [Emphasis added.]

Petitioner therefore not only failed to comply with the provisions of the rule regarding the submission of requests before argument, but he also failed, in the particular circumstances present here, to state

distinctly the ground of his objection to the charge as given.

Considering petitioner's actions in the light of the *Bruno* decision, it seems clear that petitioner did not "appropriately invoke" his requested instruction. Moreover, the *Bruno* decision held that "the accused should be allowed to make his own choice" (p. 294) as to whether it would benefit him to have the attention of the jury directed to the fact that he did not take the stand. If an accused wishes to have the attention of the jury specifically drawn to this fact, it would seem to be only elemental fairness that he plainly advise the trial court of his choice. The trial court in this case did not understand from petitioner's actions that he had specifically requested the precise language of the *Bruno* instruction. See opinion of the trial court. (79 F. Supp. 247, 249.)

Petitioner contends, finally, that the decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Smith* v. *United States,* 112 F. 2d 217, and with the decision of the Court of Appeals for the Fifth Circuit in *Chadwick* v. *United States,* 117 F. 2d 902. We see no such conflict. The latter two decisions held that it was not error for a trial court of its own motion to include the language of the *Bruno* instruction in the charge to the jury. This was not the equivalent of holding that it would be error for the trial court to fail to give such an instruction of its own motion. In effect,

that is what petitioner contends constituted the error in this case—that the trial court failed of its own motion to employ the precise language of the *Bruno* instruction. In this we think that petitioner is in error.

For the cogent reasons stated by the Court of Appeals in its opinion in this case, we believe that petitioner was also required to furnish Government counsel with a copy of the request.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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AUGUST 1949.

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